MOTION FILED
JAN 20 1987

No. 86-981

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a
NAEGELE OUTDOOR ADVERTISING CO.
OF RALEIGH-DURHAM,
Petitioner

v.

CITY OF RALEIGH,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF NORTH CAROLINA RESTAURANT ASSOCIATION AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Dated: January 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF NORTH CAROLINA RESTAURANT ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The North Carolina Restaurant Association respectively moves for leave to file the attached brief as amicus curiae in this case in support of the Petitioner. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the North Carolina Restaurant Association in this case is that it is a private, non-profit trade association whose membership is comprised of in-

dividuals and businesses involved in all aspects of North Carolina's food service industry and includes the operators of over 4,000 restaurants located in the state. The restaurant members of the North Carolina Restaurant Association rely heavily on outdoor advertising signs and billboards to promote their businesses. Many of these signs and billboards are owned by the restaurants and constitute substantial investments of those establishments. The North Carolina Restaurant Association and its members have a direct interest in the issue before the Court in this case, namely, whether an ordinance such as the City of Raleigh billboard ordinance in question which will require the destruction of existing and lawfully erected outdoor advertising billboards and signs and provide as compensation nothing more than a 5½ year grace period within which to accomplish such destruction, constitutes a taking of property without just compensation or a denial of due process in violation of the Fifth and Fourteenth Amendments.

The amicus curiae brief which the North Carolina Restaurant Association is requesting permission to file will point out and stress the impact of such an ordinance on the restaurant industry and the importance of having the legal issue involved finally determined by this Court.

Respectfully submitted this 20th day of January, 1987.

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
The Owners of Outdoor Advertising Structures Should Not Be Deprived of Their Substantial and Important Investments In Those Structures Without Just Compensation	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:

Armstrong v. *United States*, 364 U.S. 40 (1960)	4
Connolly v. *PBGC*, 106 S.Ct. 1018 (1986)	4
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 (1981)	3

UNITED STATES CONSTITUTION:

First Amendment	2, 5
Fifth Amendment	2, 4, 5
Fourteenth Amendment	2, 4, 5

MUNICIPAL CODES AND ORDINANCES (NORTH CAROLINA):

Durham City Code, Sec. 24-14(t)	4
Greenville City Code, Sec. 32-109.5.B	4
Raleigh City Code, Secs. 10-2065, 2066	4
Salisbury Zoning Ordinance, Sec. 8A-10(5)	4
Winston-Salem City Code, Sec. 25-12(f)	4

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BRIEF AS AMICUS CURIAE OF THE NORTH CAROLINA RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The North Carolina Restaurant Association (NCRA) is a private, non-profit trade association dedicated to protecting and promoting the $4 billion North Carolina commercial food service industry. The 1,000-plus members of the NCRA are comprised of individuals and businesses at all levels of North Carolina's food service industry and include the operators of over 4,000 restaurants located in the State. Tens of thousands of people are employed in North Carolina restaurants, and the health and vitality of the restaurant industry is critical

to the continued economic and social growth of North Carolina.

NCRA members rely heavily on outdoor advertising to promote their businesses and to make the public aware of the many options available to restaurant patrons in North Carolina. The restaurant business is highly competitive, and for many restaurants, especially smaller roadside operations which must compete with large regional and national fast-food and family-style restaurant chains, outdoor advertising is crucial to survival. Thus, many restaurant owners have made and continue to make substantial investments in outdoor advertising signs and billboards. The NCRA and its members are concerned about the growing efforts of local government authorities in North Carolina (and elsewhere) to force the uncompensated removal of lawfully erected signs and billboards and about the serious commercial injuries that such ordinances inflict on the owners of restaurants and other businesses.

SUMMARY OF ARGUMENT

The just compensation and due process protections of the Fifth and Fourteenth Amendments prohibit government authorities from effectively confiscating the property of a private enterprise without paying just compensation to the property owner. Restaurant owners in North Carolina (and throughout the United States) have made substantial investments in, and depend greatly on, outdoor advertising signs and billboards. Municipal ordinances such as the Raleigh sign ordinance deprive restaurant owners of these investments without just compensation, and threaten smaller businesses with extinction in the intensely competitive restaurant industry.

Moreover, while the Petition does not squarely present a First Amendment question for the Court's consideration, we believe that the patent and serious First Amendment implications of the Raleigh ordinance weigh heavily in favor of requiring the city to scrupulously abide by

the just compensation and due process provisions of the Constitution. For many NCRA members, the proliferation of local ordinances similar to the Raleigh ordinance not only forecloses one avenue of commercial speech, but also makes it impracticable for those members to advertise at all. Outdoor advertising is often the sole effective way for many restaurants to advertise. When the ability of businesses to advertise is eliminated or unduly restricted, the demise of those businesses is likely to follow.

ARGUMENT

THE OWNERS OF OUTDOOR ADVERTISING STRUCTURES SHOULD NOT BE DEPRIVED OF THEIR SUBSTANTIAL AND IMPORTANT INVESTMENTS IN THOSE STRUCTURES WITHOUT JUST COMPENSATION

1. There is no question that outdoor advertising is crucial to the survival of many businesses in the United States. "Many businesses . . . rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (plurality opinion). The importance of advertising to a restaurant's success is reflected by the substantial advertising expenditures of members of the NCRA. The NCRA estimates that 2-5% of gross restaurant receipts are spent on advertising—a figure which in North Carolina alone represents tens of millions of dollars. Restaurants are substantial users of on-premises and off-premises billboards, both as renters of billboard space and as billboard owners.

The Raleigh sign ordinance does not offer just compensation to owners of nonconforming signs. Instead, the city simply permits a five year grace or "amortization" period in which nonconforming signs and billboards may be left standing. Other municipalities in North Carolina have similar sign ordinance amortization provisions.

Durham City Code, Sec. 24-14(x); Greenville City Code, Sec. 32-109.5.B; Salisbury Zoning Ordinance, Sec. 8A-10 (5); Winston-Salem City Code, Sec. 25-12(f). The amortization period does not compensate sign owners for losses incurred when signs with long-remaining useful lives are torn down. Even assuming that legitimate governmental goals are served by the reasonable regulation of outdoor advertising structures, the just compensation and due process protections of the Fifth and Fourteenth Amendments prohibit governmental authorities from forcing private parties to carry the entire cost of accomplishing those public goals. *See Connolly v. PBGC*, 106 S. Ct. 1018, 1027 (1986), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (just compensation clause bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

While some restaurants employ several media to advertise, many of NCRA's members cannot afford to make regular use of radio, television or newspaper advertisements. Electronic advertising requires sophisticated market analyses, and constant, repeated expenditures in order to be effective. Because an average of 23% of the restaurant dollar comes from travelers and tourists (and because some restaurants derive up to 95% of their business from travelers and tourists), roadside advertising is especially important. Accordingly, billboard advertisements make up the bulk of many independent restaurant's advertising programs, and restaurants which cater to travelers often find that other advertising methods are not feasible. Newspaper ads, for example, do not reach the traveler when he or she is most likely to respond to a restaurant advertisement, i.e., when the traveler is on the road and hungry.

Exterior restaurants signs are perhaps the most crucial part of a restaurant's marketing program. Many

of these signs cost thousands of dollars to erect and constitute substantial investments by businesses in the historically low profit margin restaurant business. Specifically, many restaurants have profit margins of 10% or less of gross sales. When such a restaurant is required to replace a sign at a cost of $10,000, theoretically, that establishment must increase sales volume by $100,000 in order to pay for the sign and break even. However, in many such instances there is no extra $100,000 in sales volume available to the establishment in question and the result is a substantial loss to the restaurant operator. This also helps to explain the high morality rate of the restaurant industry. As the Petition points out (pp. 20-24), there is "substantial confusion and uncertainty" in the lower courts "concerning the removal, without compensation, of billboards or other structures or uses made nonconforming by a land use regulation." Although Petitioner's challenge to the Raleigh sign ordinance involves a challenge to "off-premise" sign regulation, the rationale of many lower court opinions may well be applied with equal force to on-premise advertising. Indeed, Raleigh itself previously considered but rejected a plan providing for the "amortization" of on-premise signs and billboards (Petition at 4) and might reconsider the matter in light of the two lower court opinions upholding the Raleigh ordinance. NCRA members are concerned about the safety of on-premise sign and billboard investments so long as it is unclear whether those investments may be confiscated by any of the hundreds of municipal governments in North Carolina under similar ordinances. The Court should accept the Petition and lay these uncertainties to rest.

2. The NCRA also believes that the right of its members to employ outdoor advertising signs and billboards to attract customers raises serious free speech concerns. While we recognize that the Petition does not squarely present a First Amendment issue for the Court to resolve, the unmistakable impact of Raleigh-type sign or-

dinances is that many businesses will be entirely precluded from engaging in effective commercial speech. The free speech implications of such municipal regulation make it imperative that municipalities strictly adhere to the Fifth and Fourteenth Amendments by paying for advertising property taken from private businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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